

OPTIONS FOR IMPLEMENTING A COMPETITIVE BUSINESS ENVIRONMENT IN MONTANA: AN OUTLINE FOR COMMITTEE DISCUSSION

for the Business, Labor, and Agriculture Interim Committee
by Gordy Higgins, Research Analyst, Legislative Services Division

Based on the Committee's preliminary discussion of the results of the government competition survey, the following policy option represents a starting point for draft recommendations. In the following paragraphs, each component is discussed along with a number of considerations that should be addressed to ensure that the full intent of the Committee will be clear.

I. Private preference policy

The first activity would be to establish a private preference policy in law that provides a clear intent to the public and private sectors that it is in the public's best interest that the state endeavor to utilize the private sector for the provision of public services when appropriate following a rigorous review of several factors.

Within the private preference policy is the assessment of the commercial services that, initially, will drive the competitive business environment process. The list of commercial services should be viewed as a tool to determine cases in which the state could, following a review process, choose a private vendor to deliver the services. The list serves an additional purpose in that it also identifies, by virtue of being excluded from the list, those public services that the state believes are required by the public interest to be provided by the government. However, the Legislature should also consider that even though a service may be included on the commercial services list, the function may be inherently governmental.

Initiating this policy would clearly signify and justify the Legislature's intent to reduce or eliminate incidences of unfair government competition and would offer a formal process for making decisions about who provides a service. The formal process removes the uncertainty regarding real or perceived benefits that results from an ad hoc approach.

II a. Statutorily create a "competition council"

The second order of business is to create a "competition council" and empower it with clear authority and objectives. The council could take many forms, including:

- appointed solely by the Legislature;
- appointed solely by the Governor; or
- appointed jointly.

The membership, terms of appointment, and where the council should be administratively attached are details the Committee needs to consider.

More importantly, the Committee must decide on the role and responsibilities of the council. The Legislature may authorize the council to review agency activities to determine a list of commercial services, adopt rules implementing the broad policy guidelines requiring the establishment of a full cost accounting model, and make a final decision as to whether services should be conducted by public entities or private providers. If the council is given the authority to make a final decision, the council becomes an inherent function and tool of the Executive Branch.

- II b.** The Legislature may wish to limit the duties of the council by requiring that the Executive Branch conduct an initial analysis of commercial services and by restricting the council's work to simply reviewing the evidence collected from both public and private providers. The Legislature could require the Executive Branch to conduct the analysis under the same justification used for HB 64. Similarly, the Department of Administration, rather than the council, could be given the authority to adopt rules related to the implementation of a full cost accounting model.

III. Review process

- Full cost accounting requirement
- Request for proposals (RFP)

If a service is on the commercial services list (regardless of who develops the list), the affected agency is directed by the council to simultaneously issue a request for proposals and conduct a cost analysis using the full cost accounting guidelines developed by the Legislature. The RFP document must reflect the same characteristics present in the cost accounting document to allow for a literal line-by-line comparison of the competing proposals.

When both proposals are completed, the council must consider whether, on the basis of cost, the service should be provided in-house or be subject to a privatization option. If choosing one proposal over the other is clearly in the public's interest relative to the actual costs associated with providing the service, the council shall make its decision known to the competing bidders. If the costs are reasonably similar, the council must assess a number of additional factors to determine whether the service is conducted by an in-house provider or a private sector provider. The factors include but are not limited to the:

- quality of service;
- accountability and responsiveness of the service provider;
- ability to readily define the nature and scope of the service;
- public health, safety and welfare issues;
- legal barriers;

- time or resource constraints; and
- impact on public employees.

These factors represent a broad stroke of considerations that policymakers should outline in a competitive business environment policy. No attempt has been made to assign a quantitative value to the listed factors or include them in a policymaking calculus. The Legislature should expect the decisionmaking body to exercise due diligence when valuing these items and their relationship to the cost analysis.

Following the analysis of the additional factors, if appropriate, the council announces its decision. Three entities should be afforded the ability to request a review of a commercial service: a state agency, a private vendor, or the Legislature by joint resolution.

IV. Administrative hearing

If, following the council's decision, either a private vendor or, potentially, a public employee organization wishes to challenge the decision based on the fact that the council failed to follow the law as written or consider the appropriate evidence, the appellant may employ an administrative hearing process. The hearing process begins with the council and is exhausted with an appearance before the Governor. If the appellant does not receive satisfaction through the administrative hearing process, the option to file a legal action in a district court is available.

V. Final decision and implementation

Depending on the recommendation made by this Committee, the reviewing body may have the authority to either direct an agency to act on the reviewing body's decision or make a recommendation to the full Legislature outlining its reasons for any decision regarding service delivery. As was mentioned earlier, the Legislature may not wish to involve itself in the implementation regarding a decision upholding or modifying the manner in which services are provided. Rather, the Legislature should ensure that the policy statements that are made under the competitive business environment proposal are clear so that the Executive Branch can act with certainty.

This outline represents a skeletal framework for addressing the concerns raised by House Bill No. 515. If the concepts are approved by the Committee, a more detailed approach is necessary to ensure that any gaps in the process are bridged and any performance or monitoring procedures are considered in the event that services are moved from the public sector to the private sector.

CI2255 0109ghxa.